No. 88-1993

IN THE

Supreme Court of the United States

October Term, 1988

ROBERT A. BUTTERWORTH, JR.
Attorney General of the State of Florida, and
T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte County, Florida,
Special Grand Jury,

Petitioners,

v.

MICHAEL SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

Brief of Respondent Smith

Although Respondent Smith's Statement of the Case purports to concur with petitioners' statement, the argument contains factual assertions that are not supported by the record and with which petitioners strongly disagree. Moreover, in Point I.B., Smith raises a new argument, that being that § 905.27, Florida Statutes, is unconstitutionally vague in that he cannot determine what speech about the grand jury is legal and what is not. Br. 11-15. He now suggests that *any* comment on his investigation, the grand jury investigation, the "underlying facts" or the same "subject matter," or even "editorial comment," may be prohibited and could result in his prosecution. Br. 11-15.

From the beginning, Smith has sought simply to divulge to the public the *testimony* he gave and the *evidence* he observed. Complaint paragraphs 8, 9, 10, 18 (Pet. App. 31, 33); Trial Court Memorandum of Law (JA 4, 5); Initial Brief to the Eleventh Circuit 6, 33. He has never expressed confusion about what they are.[1] And, contrary to the representation that Smith was warned by the state attorney not to "comment," Br. at 11, the *verified* complaint alleges he was warned not to reveal his *testimony*. Pet. App. 31. Smith has not heretofore expressed doubt about what limitations (if any) are imposed by § 905.27 on published comment that

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1 In the proceedings below, Smith argued only that the statute was overly broad in prohibiting "any person" from revealing his testimony. *See* Initial Brief to Eleventh Circuit at 6, 33. He contended that there was no need for a blanket prohibition on *all* witnesses and that the alleged constitutional defect could be remedied by striking the words "any other person" in § 905.27(1) and "any person" in § 905.27(2). Br. 6, 33. That is how the Eleventh Circuit decided the case. Pet. App. 7, 8. Smith has never previously argued that the statute was too vague to permit him to distinguish between permissible comment or criticism and the prohibited disclosure of testimony or evidence received by the grand jury.

does not disclose his testimony or other evidence given the grand jury.[2] Smith states as a fact Florida grand jury investigations would not be compromised by lack of witness secrecy because they are used only for capital crimes and political matters and that ninety-nine per cent of all prosecutions are initiated by information. Br. 28. He submits that all other non-grand jury investigations in Florida are "open books," Br. 29, and asserts that if they are not compromised by a lack of secrecy, neither would be grand jury proceedings. The record evidence does not support these assertions or conclusions, and petitioners strongly take issue with them.

Smith's factual assertions do not recognize the many different types of crime or acknowledge that some are complex or involve organized criminal activity and are better served by secrecy. Grand juries everywhere, including Florida, investigate such crime, not just murders or political chicanery. Smith fails to note Florida has a specially created statewide grand jury that was established to take some of the burden off local grand juries investigating complex criminal activity. *See* § 905.31-905.40, Florida Statutes (1987)(A 9-15). Moreover, the factual contention that other investigations in Florida are "open books" is misleading. It is commonplace knowledge that law enforcement authorities publicly announce only what they want the public to know about pending investigations. Florida's Public Records Law does *not* require disclosure of any criminal intelligence information or criminal investigative information as long as it is "active", and it is considered active at least as

2 There is no Florida case law suggesting that § 905.27 is as restrictive as Smith now suggests. However, Smith could have sought a declaratory judgment under Florida law as to whether § 905.27 applied to editorial comments or discussion of his own investigation, and to what extent. *See* § 86.011-86.111, Florida Statutes (1987)(A 1-3). Plainly, by its terms, § 905.27 pertains only to disclosure of testimony and evidence given the grand jury, not to comment or criticism.

long as any appeals are pending. *See* § 119.011(3)(d) (A 4-7) and § 119.07(3)(d) (A 7), Florida Statutes (1988 Supp.). Much criminal information is never disclosed. *See* § 119.07(3)(a)-(m), Florida Statutes (1988 Supp.) (A 7-8).

As to the instant record, the single witness who testified he "couldn't think of any problems" caused by a lack of witness secrecy had no experience prosecuting on behalf of the state. By any measure, that is scant evidence upon which to strike down a statute, especially when Smith's only other witness did not feel competent to give an opinion but did recount a number of problems caused by lack of witness secrecy in the federal system. R11, pps. 14-21.

Amicus Brief of Reporters Committee et al.

The Statement of the Case and the appendix to this brief consist entirely of non-record material. Particularly offensive is the inclusion of non-record newspaper articles to establish factual premises that Smith failed to do. The brief's argument is largely addressed to this material. As the brief does not conform to this Court's rules and accepted appellate practice, it should be stricken or disregarded.

I. FLORIDA STATUTE § 905.27 IS CONSTITUTIONAL NO MATTER WHETHER THE *SEATTLE TIMES V. RHINEHART* TEST OR THE COMPELLING STATE INTEREST TEST IS APPLIED.

Smith argues that § 905.27 must serve a state interest of the highest order, relying primarily on *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and *Worrell Newspapers of Indiana, Inc. v. Westhafer*, 739 F.2d 1219 (7th Cir. 1984), *aff'd* 469 U.S. 1200 (1985). In these cases, however, state statutes were used in efforts to punish publication not just of "truthful information" as Smith represents,

but of truthful information *in the public domain*. Testimony and evidence given a grand jury, and by law kept secret, are not matters within the public domain. Smith's position as a witness is in no way analogous to the news reporters in the above cases. The contention that Smith has a constitutional right to disclose his grand jury testimony or other evidence before the grand jury is no more valid than the contention that the public has a right of access to grand jury proceedings, and this has certainly never been the law.[3] Moreover, this Court expressly noted in *Landmark, supra,* that it was not deciding a challenge to a state's power to keep certain investigative functions confidential or to punish *participants and witnesses* for a breach of confidentiality. 435 U.S at 837 and n. 10. Neither *Daily Mail* nor *Worrell Newspapers, supra,* addressed this question either.

Smith attempts to distinguish *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984), on the ground that the legal process did not grant him access to information but rather compelled him to divulge it, Br. 16, 17, and the amici, Reporters Committee etc., on the ground that *Seattle Times* establishes a case-by-case analysis requirement before restraining publication. Br. 44, n.10. The latter distinction fails because it was not the Seattle Times whose First Amendment rights were at stake, but those of the adversary party compelled to divulge highly personal information.[4] Such

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3 *See Branzburg v. Hayes,* 408 U.S. 665, 684 (1972) ("Despite the fact that newsgathering may be hampered, *the press is regularly excluded from grand jury proceedings,* our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations") (emphasis added).

4 Justice Powell's opinion for the Court clearly implied that the protective order simply did not implicate the Times' First Amendment interests except in a very incidental way. It stated that "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." 467 U.S. 32.

objections to use of discovery material can only be made on a case-by-case basis under the discovery rules.

Smith's attempt to distinguish *Seattle Times* fails because what he has always wanted to disclose is his *testimony* and other evidence received by the grand jury, and that is prohibited by § 905.27. Testimony and evidence given the grand jury are not his to acquire, they are not in the public domain, and Smith does not stand in the shoes of the third party news persons in *Daily Mail Publishing Co., Landmark Communications* and *Worrell*. Moreover, the state need not show a compelling interest to keep secret non-public testimony, nor need it justify secrecy on a case-by-case basis. Under the same test used in *Seattle Times,* validity of this restriction depends on the overall problem the government seeks to address, and "not on the extent to which it furthers the government's interests in an individual case." *Ward v. Rock Against Racism,* ___U.S.___, 105 L.Ed.2d 661, 682 (1989).[5]

Smith attempts to bolster his attack on § 905.27 by arguing that he is confounded by the meaning of the term "testimony" or "the content, gist or import thereof," *see* § 905.27(2), and that such language may preclude any comment or discussion by him of the "matters under investigation."[6] We submit this language is clear and concise and

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5 *See also Brown v. Glines,* 444 U.S. 348 (1980), *Secretary of the Navy v. Huff,* 444 U.S. 453 (1980), and *Greer v. Spock,* 424 U.S. 828 (1976), all of which involved restrictions on the exercise of First Amendment rights on military bases. This Court did not hold that national security or military preparedness had to be imperilled *in the particular case* in order to uphold the restrictive regulations.

6 As indicated, this vagueness argument is not proper because it is raised for the first time in this Court. Had Smith had a genuine fear about the clarity and reach of the language, he could very easily have asked Florida courts to construe the law or at least have raised the issue in the district court.

simply forbids Smith from reciting or summarizing his testimony or revealing its subject matter.[7] The State of Florida does not and never has suggested that § 905.27 prohibits Smith from reporting on facts that are in the public domain, even if he put those facts before the grand jury. He may also comment editorially or otherwise on the investigation. He may not reveal what he said to the grand jury or what evidence he observed was before them. *Morgan v. State,* 337 So.2d 951, 954 (Fla. 1976) ("The only crime set forth in Ch. 905, *supra,* relates to revealing the *testimony* of a witness before the grand jury. . .") (emphasis in original). The facial attack by Smith and the amici must fail because it is not shown either that the law "could never be applied in a valid manner" or that it is "substantially overbroad."

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7 The words "content", "gist" and "import" need only be given their ordinary meaning and application. All apply to the word "testimony", not "matters under investigation." Thus, Smith cannot reveal the "content", that is, the subject matter of his testimony (e.g., "My testimony concerned bribery allegations against Mayor Doe"). He cannot state its "gist," that is, a condensed or summarized accounting (e.g., "I said Mayor Doe does not take bribes"). Nor can he indicate its "import," that is, its effect or significance (e.g., "My testimony was intended to exonerate Mayor Doe from accusations of bribery"). Smith certainly is free to say at any time that "I believe Mayor Doe is innocent," or that "The grand jury is on a fishing expedition."

New York State Club Association v. City of New York, ___U.S.___, 108 S. Ct. 2225, 2233 (1988).[8]

Further, Florida submits that § 905.27 meets the compelling state interest test, assuming it applies. The investigation of crime by the grand jury implements a "fundamental governmental role" in securing the safety of the person and property of the citizenry, and calling reporters to testify bears a reasonable relationship to that purpose. *Branzburg v. Hayes,* 408 U.S. 665, 700 (1972). Other than national security, it is difficult to conceive of what qualifies as a compelling governmental interest if it is not the protection of the integrity of important criminal investigations. If, as a general rule, grand jury investigations meet the compelling state interest test and do not impermissibly burden the First Amendment when reporters are required to disclose confidential sources or information, as this Court held in *Branzburg,* it surely follows that protecting the fruits of an investigation and the integrity of the investigative process must be at least as compelling a state interest. Certainly the forced disclosure of confidential information — with all the adverse consequences that entails for newsgathering — is a

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8 Along the same lines, the amicus brief of the Reporters Committee, et al. argues that "the statute can serve its intended purpose only if it prohibits witnesses from discussing all that they know about the subject under investigation merely because they were questioned by the grand jury," Br. 40, and that "if a witness such as Smith is questioned closely by the grand jury there will be nothing that person can say publicly after appearing. . . ." Br. 41. This interpretation of the statute was never argued below, and there is no basis for assuming Florida courts would adopt such an extreme construction. Had Florida courts had the opportunity, they might have construed the statutory secrecy requirement as the Connecticut Supreme Court construed the oath of secrecy in *State v. Kemp,* 1 A.2d 761, 762-763 (Conn. 1938) (oath of secrecy prevents witnesses from disclosing what took place in grand jury room but not from giving defendants information relevant to their prosecution "even though it was the same information as to which they testified before the grand jury"). *See, e.g., Morgan v. State,* 337 So. 2d 951, 954 (Fla. 1976).

greater burden on the First Amendment than is the maintenance of grand jury secrecy.

Finally, testimony given a grand jury is not the witness's personal property, nor is it public property any more than was the protected discovery information in *Seattle Times, supra*. Its disclosure therefore may be permanently prohibited. This Court's decision in *Seattle Times* imposed no obligation on trial courts to revisit protective orders at some later date when disclosure of discovery information would arguably cause less harm. Also instructive on this point is the decision in *Snepp v. United States,* 444 U.S. 507 (1980), wherein this Court upheld the validity of a former CIA agent's agreement not to disclose any material or information relating to the CIA that *might* compromise classified information. The bar against disclosure was permanent and enforceable by injunction and constructive trust even though the information disclosed in the particular instance was not itself classified. By contrast, the limitation on Smith applies only to what he learns or testifies to in the grand jury room, not what he learns in the customary manner of newsgathering.

II. THE DEGREE OF SECRECY ACCORDED GRAND JURY PROCEEDINGS IS A POLICY DECISION APPROPRIATELY MADE BY THE LEGISLATURE.

In Point II of his brief, Smith argues that § 905.27 serves no compelling state interest because in his view it does not protect the identity of grand jurors, prevent interference with their investigation or deter subornation of perjury or witness tampering. He also argues that a witness has a First Amendment right to sully the name of an innocent accused by virtue of what the witness may learn in the grand jury room. The State of Florida takes the strongest issue with these factual and legal conclusions.

Without explanation or citation to authority or the record, Smith asserts the names of grand jurors are "generally available to the public," Br. 24, and hence jurors are not insulated from retaliation by § 905.27. If this is so, which is by no means clear from Smith's argument, it is not by virtue of his passing reference to § 905.02–§ 905.05, Florida Statutes (1987) (A 9-10), permitting "a person who has been held to answer" to challenge individual grand jurors. In many investigations of organized crime, drug trafficking and other complex criminal activity, no person "will have been held to answer." *See* § 905.05 (A 9-10). Where a person is held to answer, providing the grand juror's names to him does not necessarily mean that they will become generally available to the public. But even to assume the public availability of jurors' names does not carry the day. A juror who knows his identity, questions and concerns are subject to revelation, whether by truthful or sensationalized reporting, may well be a less effective participant and lack that "necessary independence of mind" the district court thought essential. *See* Pet. App. 27.

Smith states that it is only "speculative" whether witness secrecy deters subornation of perjury or witness tampering or can otherwise compromise an investigation. Br. 22. But this Court has recognized that these exact possibilities are the very basis for grand jury secrecy. *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 219 n.10 (1979). A witness's disclosures can lead to importuning grand jurors, subornation of perjury or tampering just as easily, if not more so, than can disclosures by the other participants whose secrecy is also compelled. To accept Smith's arguments on these points would mean that no obligation of secrecy could be imposed on grand jurors or

other participants because the harm they may do, no matter how incalculable in a given case, is "speculative."[9]

In support of this argument, Smith cites one article for the conclusion that there is no "empirical evidence" to suggest that lack of witness secrecy has interfered with the functioning of the grand jury under Rule 6(e), Fed.R.Cr.P. See Br. at 26 citing Brown, *Witnesses and Grand Jury Secrecy,* 11 Am.J.Crim.L. 169, 181 (1983). The article's statement is completely unsupported; it reveals no investigation on the part of the author or anyone else that would substantiate the conclusion. Although a similar statement is also quoted from *In re Russo,* 53 F.R.D. 564, 570 (C.D. Cal. 1971), it likewise is unsubstantiated. To the contrary is the record testimony of one of Smith's own witnesses as well as three witnesses for the State of Florida, all of which is ignored in Smith's brief.

Relying on *Landmark Communications, Inc. v. Virginia, supra,* Smith asserts that the First Amendment means he is entitled to report whatever he learns in the grand jury room no matter the injury to the reputation of an innocent accused. But *Landmark* and the other cases cited do not support this argument because Smith was a grand jury witness — a participant in the process — not like the reporters in *Landmark, Daily Mail* and other cases who were outsiders. As we have repeatedly said, to the extent Smith finds facts or information outside the grand jury room, he may report them.

More than anything, Smith's arguments simply reflect disagreement with legislative decisions and an assumption

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9 Smith also states that because § 905.27 was not enacted until 1951, there was no previous tradition of witness secrecy in Florida. Br. 27. This bare assertion does not show that Florida did not follow the practice of administering an oath of secrecy to witnesses, as was then commonplace in state and federal courts.

that he knows more about how to ensure effective law enforcement. He suggests that courts rather than legislatures should decide what testimony and evidence merit protection against disclosure, and under what circumstances, and how serious must be the threat of compromise or embarrassment that would result from disclosure. These are precisely the types of value judgments this Court has ruled are the prerogative of legislatures, not courts. *Branzburg v. Hayes,* 408 U. S. at 706. In *Branzburg,* this Court declined to recognize a First Amendment privilege on the part of news reporters to refuse to divulge confidential sources to grand juries and rejected the contention that such a privilege should be applied by courts on a case-by-case basis depending on the interests at stake.[10] To like effect is

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10 Deciding which interests merit the protection of secrecy and which do not and how much secrecy is necessary is no different from deciding which reporters could assert a privilege against disclosure and which could not. *Neither* is properly a judicial task:

> Thus, in the end, by considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.
>
> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and

Houchins v. KQED, Inc., 438 U. S. 1 (1978), wherein the Court rejected an invitation "to involve itself in what is clearly a legislative task which the Constitution has left to the political processes," and decided that "[w]hether the government should open penal institutions [to the news media for reporting purposes] is a question of policy which a legislative body might appropriately resolve one way or the other." *Id.* at 12.

The First Amendment simply does not confer the rights Smith seeks to establish. It confers no right for a reporter to publish "news" obtained by theft or private wiretapping, *Branzburg*, 408 U.S. at 691-92, any more than it confers a right upon government employees to disclose as news classified military or intelligence information, *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972), and *United States v. Morison*, 844 F.2d 1057, 1068-69 (4th Cir. 1988), in the face of criminal laws prohibiting such conduct. The freedom of the press is not the freedom to do wrong or to defeat the discharge of governmental duties. *Branzburg, supra*, at 692 quoting *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419-420 (1918). Smith has not shown why the testimony, evidence, and fruits of a grand jury investigation into criminal enterprises should be treated differently. It certainly cannot be said on the basis of this Court's decisions that a right to disclose comes into play when, in the personal opinion of the government agent or grand jury witness, the information is so dated or so unimportant that its publication would be harmless. That, in essence, is Smith's argument.

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problems with respect to the relations between law enforcement officials and press in their own areas.

Branzburg v. Hayes, 408 U.S. at 705-706.

Witness secrecy serves the same function as the secrecy requirement imposed on all other grand jury participants. Florida's decision to impose stricter secrecy than is found in the federal system or some other states reflects a valid legislative choice, not a constitutional defect. Although respondent's brief makes much of the fact that the majority of states and the federal rules do not prohibit witness disclosures, the brief does not show that either a single state or Congress has thought its choice compelled by the First Amendment.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the decision of the District Court reinstated.

Respectfully submitted,

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APPENDIX

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EXCERPTS FROM CHAPTER 86, FLORIDA STATUTES (1987)

DECLARATORY JUDGMENTS

86.011 Jurisdiction of circuit court.—The circuit courts have jurisdiction to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

(1) Of any immunity, power, privilege, or right; or

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

86.021 Power to construe.—Any person claiming to be interested or who may be in doubt about his rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or

instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

86.051 Enumeration not exclusive.—The enumeration in ss. 86.021, 86.031 and 86.041 does not limit or restrict the exercise of the general powers conferred in s. 86.011 in any action where declaratory relief is sought. Any declaratory judgment rendered pursuant to this chapter may be rendered by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the judgment shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the judgment was rendered.

86.091 Parties.—When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard. If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.

86.101 Construction of law.—This chapter is declared to be substantive and remedial, its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed.

86.111 Existence of another adequate remedy; effect.—The existence of another adequate remedy does not

preclude a judgment for declaratory relief. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.

EXCERPTS FROM CHAPTER 119, FLORIDA STATUTES (1988 SUPP.)

PUBLIC RECORDS

119.011 Definitions.—For the purpose of this chapter:

(1) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

(2) "Agency" means any state, county, district, authority, or municipal officer, department, division, board bureau, commission or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

(3)(a) "Criminal intelligence information" means information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.

(b) "Criminal investigative information" means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

(c) "Criminal intelligence information" and "criminal investigative information" shall not include:

1. The time, date, location, and nature of a reported crime.

2. The name, sex, age, and address of a person arrested or of the victim of a crime except as provided in s. 119.07(3)(h).

3. The time, date, and location of the incident and of the arrest.

4. The crime charged.

5. Documents given or required by law or agency rule to be given to the person arrested, except as provided in s. 119.07(3)(h), and, except that the court in a criminal case may order that certain information required by law or agency rule to be given to the person arrested be maintained in a confidential manner and exempt from the provisions of s. 119.07(1) until released at trial if it is found that the release of such information would:

a. Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and

b. Impair the ability of a state attorney to locate or prosecute a codefendant.

The exemptions in this subparagraph are subject to the Open Government Sunset Review Act in accordance with s. 119.14.

6. Informations and indictments except as provided in s. 905.26.

(d) The word "active" shall have the following meaning:

1. Criminal intelligence information shall be considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will

lead to detection of ongoing or reasonably anticipated criminal activities.

2. Criminal investigative information shall be considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future.

In addition, criminal intelligence and criminal investigative information shall be considered "active" while such information is directly related to pending prosecutions or appeals. The word "active" shall not apply to information in cases which are barred from prosecution under the provisions of s. 775.15 or other statute of limitation.

(4) "Criminal justice agency" means any law enforcement agency, court, or prosecutor. The term also includes any other agency charged by law with criminal law enforcement duties, or any agency having custody of criminal intelligence information or criminal investigative information for the purpose of assisting such law enforcement agencies in the conduct of active criminal investigation or prosecution or for the purpose of litigating civil actions under the Racketeer Influenced and Corrupt Organization Act, during the time that such agencies are in possession of criminal intelligence information or criminal investigtive information pursuant to their criminal law enforcement duties.

119.07 Inspection and examination of records; exemptions.—

(1)(a) Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or his designee. The custodian shall

furnish a copy or a certified copy of the record upon payment of the fee prescribed by law or, if a fee is not prescribed by law, upon payment of the actual cost of duplication of the record. . . .

* * * * *

(3)(a) All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law are exempt from the provisions of subsection (1).

* * * * *

(d) Active criminal intelligence information and active criminal investigtive information are exempt from the provisions of subsection (1).

(e) Any information revealing the identity of a confidential informant or a confidential source is exempt from the provisions of subsection (1).

(f) Any information revealing surveillance techniques or procedures or personnel is exempt from the provisions of subsection (1). Notwithstanding s. 119.14, any comprehensive inventory of state and local law enforcement resources compiled pursuant to part 1, chapter 23, and any comprehensive policies or plans compiled by a criminal justice agency pertaining to the mobilization, deployment, or tactical operations involved in responding to emergencies, as defined in s. 252.34(2), are exempt from the provisions of subsection (1) and unavailable for inspection, except by personnel authorized by the Governor, the Department of Legal Affairs, the Department of Law Enforcement, or the Department of Community Affairs as having an official need for access to the inventory or comprehensive policies or plans. This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14.

(g) Any information revealing undercover personnel of any criminal justice agency is exempt from the provisions of subsection (1).

(h) Any criminal intelligence information or criminal investigative information including the photographs, name, address, or other fact or information which reveals the identity of the victim of the crime of sexual battery as defined in chapter 794; the identity of the victim of the crime of lewd, lascivious, or indecent assault upon or in the presence of a child, as defined in chapter 800; or the identity of the victim of the crime of child abuse as defined by chapter 827 and any criminal intelligence information or criminal investigtaive information or other criminal record, including those protions of court records, which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in chapter 794, chapter 800, or chapter 827.

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(j) All criminal intelligence and criminal investigative information received by a criminal justice agency prior to January 25, 1979, is exempt from the provisions of subsection (1).

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(m) Any information revealing the substance of a confession of a person arrested is exempt from the provisions of subsection (1), until such time as the criminal case is finally determined by adjudication, dismissal, or other final disposition.

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EXCERPTS FROM CHAPTER 905, FLORIDA STATUTES (1987)

GRAND JURY

905.02 Who may challenge.—The state or a person who has been held to answer may challenge the panel or individual grand jurors.

905.03 Ground for challenge to panel.—a challenge to the panel may be made only on the ground that the grand jurors were not selected according to law.

905.04 Grounds for challenge to individual prospective grand juror.—

(1) The State or a person who has been held to answer may challenge an individual prospective grand juror on the ground that the juror:

(a) Does not have the qualifications required by law;

(b) Has a state of mind that will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging;

(c) Is related by blood or marriage within the third degree to the defendant, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted.

(2) The state may challenge an individual prospective grand juror on the ground that the prospective juror is surety on the bail undertaking of any person whose case will come before the grand jury.

905.05 When challenge or objection to be made.—A challenge or objection to the grand jury may not be made after it has been impaneled and sworn. This section shall

not apply to a person who did not know or have reasonable ground to believe, at the time the grand jury was impaneled and sworn, that cases in which he was or might be involved would be investigated by the grand jury.

905.31 Short title.—Sections 905.31–905.40 shall be known and may be cited as the "Statewide Grand Jury Act."

905.32 Legislative intent.—It is the intent of the Legislature in enacting this act to strengthen the grand jury system and enhance the ability of the state to detect and eliminate organized criminal activity by improving the evidence-gathering process in matters which transpire or have significance in more than one county.

905.33 Petition to Supreme Court by Governor; order.—

(1) Whenever the Governor, for good and sufficient reason, deems it to be in the public interest to impanel a statewide grand jury, he may petition in writing to the Supreme Court for an order impaneling a statewide grand jury. The petition shall state the general crimes or wrongs to be inquired into and shall state that said crimes or wrongs are of a multicircuit nature. The Supreme Court may order the impaneling of a statewide grand jury, in accordance with the petition, for a term of 12 calendar months. Upon petition by a majority of the statewide grand jury or by the legal adviser to the statewide grand jury, the Supreme Court, by order, may extend the term of the statewide grand jury for a period of up to 6 months.

(2) The Chief Justice of the Supreme Court shall designate a judge of a circuit court to preside over the statewide grand jury; such judge shall be referred to herein as the presiding judge.

905.34 Powers and duties; law applicable.—The jurisdiction of a statewide grand jury impaneled under this

chapter shall extend throughout the state. The subject matter jurisdiction of the statewide grand jury shall be limited to the offenses of bribery, burglary, criminal fraud, criminal usury, extortion, gambling, kidnapping, larceny, murder, prostitution, perjury, and robbery; crimes involving narcotic or other dangerous drugs; any violation of the provisions of the Florida RICO (Racketeer-Influenced and Corrupt Organization) Act; any violation of the provisions of the Florida Anti-Fencing Act; any violation of the provisions of the Florida Antitrust Act of 1980, as amended; or any attempt, solicitation, or conspiracy to commit any violation of the crimes specifically enumerated above, when any such offense is occurring, or has occurred, in two or more judicial circuits as part of a related transaction or when any such offense is connected with an organized criminal conspiracy affecting two or more judicial circuits. The statewide grand jury may return indictments and presentments irrespective of the county or judicial circuit where the offense is committed or triable. If an indictment is returned, it shall be certified and transferred for trial to the county where the offense was committed. The powers and duties of, and law applicable to, county grand juries shall apply to a statewide grand jury except when such powers, duties and law are inconsistent with the provisions of ss. 905.31–905.40.

905.35 Appointment of foreman and deputy foreman.—The statewide grand jury shall elect, by majority vote, a foreman and deputy foreman from among its members.

905.36 Duty of state attorney or other legal adviser; presentation of evidence.—The statewide prosecutor in charge of the Office of Statewide Prosecution shall attend sessions of the statewide grand jury and serve as its legal adviser. The legal adviser shall examine witnesses; present evidence; and draft indictments, presentments, and reports upon the direction of the statewide grand jury. The

legal adviser may designate one or more of his assistants, any state attorney, or one or more assistant state attorneys to attend sessions ofthe statewide grand jury and perform his duties. The legal adviser and his assistants or a state attorney or assistant state attorney designated by the legal adviser to advise the statewide grand jury shall be empowered to prosecute an indictment returned by the statewide grand jury in the judicial circuit where the proper venue lies.

905.37 List of prospective jurors; impanelment; composition of jury; compensation.—

(1) On or before July 15, 1973, and not later than the first week in December of each year thereafter, the chief judge of each judicial circuit shall cause to be compiled a list of persons called and certified for jury duty in each of the several counties in the circuit. From the lists of persons certified for jury duty in each of the several counties in his judicial circuit, the chief judge shall select by lot and at random a list of eligible prospective grand jurors from each county. The number of prospective statewide grand jurors to be selected from each county shall be determined on the basis of three such jurors for each 3,000 residents, or fraction thereof, in each county. When such lists are compiled, the chief judge of each judicial circuit shall cause the lists to be submitted to the state courts administrator on or before August 15, 1973, and not later than February 15 of each year thereafter.

(2) The state courts administrator, upon receipt of the order of the Supreme Court granting a petition to impanel a statewide grand jury, shall certify and submit to the presiding judge the lists submitted by the chief judge of each judicial circuit. The Supreme Court shall provide in its order impaneling the statewide grand jury whether the prospective jurors are to be drawn from the jury lists, as selected, certified, and submitted pursuant to this section, from a

designated circuit or circuits or from a statewide list containing the names of all persons who are named in the certified jury lists submitted by the chief judge of each judicial circuit. If the Supreme Court determines, based upon the facts set forth in the Governor's petition, that the principal scope of the investigation to be conducted by the statewide grand jury is limited to a particular region or section of the state, or if, in the interest of convenience to the prospective grand jury witnesses, law enforcement officers, or others, the investigation could more appropriately operate within a particular region or section of the state, then, in either such event, the Supreme Court may designate the judicial circuits within that region of the state which shall be the base operating area for the staewide grand jury, from which designated circuits the prospective jurors of the statewide grand jury shall be selected. The presiding judge shall, by lot and at random, select and impanel the statewide grand jury from the jury lists of the designated circuits certified and submitted through state courts administrator, or of the composite statewide list, in accordance with the order of the Supreme Court. In selecting and impaneling the statwide grand jury in the manner prescribed herein, the presiding judge shall select no fewer than one statewide grand juror from each congressional district in the state. Each such prospective juror may be excused by the presiding judge upon a showing that service on the statewide grand jury will result in an unreasonable personal or financial hardship by virtue of the location or projected length of the grand jury investigation.

(3) A statewide grand jury shall be composed of 18 members, of which 15 members shall constitute a quorum. Each member of the statewide grand jury shall be a registered elector in the county in which he resides. In all other respects a statewide grand juror shall have the same qualifications as provided in the chapter in the case of a county grand jury.

(4) Upon receiving a summons to report for jury duty, any employee shall, on the next day he is engaged in his employment, exhibit the summons to his immediate superior; and the employee shall thereupon be excused from his employment for the period that he is actually requried to be in court attendance, plus reasonable travel time.

(5) While attending a session of the statewide grand jury, each grand juror shall receive a fee of $10 per day as provided in s. 40.24. Additionally, each grand juror attending a grand jury session shall receive per diem and traveling expenses as provided under s. 112.061.

905.38 Summoning of jurors.—The Clerk of the Supreme Court, upon receipt of the venire for the statewide grand jury from the presiding judge, shall issue and cause to be delivered to the sheriff of the county in which a member of the statewide grand jury resides, a venire of the grand jury commanding the sheriff to summon, in accordance with the venire, the persons named in the venire who reside in the county.

905.39 Judicial supervision; returns.—Judicial supervision of the statewide grand jury shall be maintained by the presiding judge, and all indictments, presentments, and formal returns of any kind made by such grand jury shall be returned to the presiding judge.

905.395 Unlawful acts related to disclosure of proceedings; penalty.—Unless pursuant to court order, it is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person outside the statewide grand jury room, any of the proceedings or identity of persons referred to or being investigated by the statewide grand jury. Any person who violates the provisions of this subsection is guilty of a felony of the third

degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

905.40 Payment of costs and expenses.—The costs and expenses incurred by the statewide grand jury in the performance of its functions and duties shall be paid by the state out of funds appropriated to the circuit courts.